

1 sent it to Ms. Stithe.

2 JUDGE SIPPEL: I don't see the  
3 copy.

4 MR. ROSE: It was blind copied is  
5 my understanding.

6 JUDGE SIPPEL: Well, it doesn't  
7 show as a blind copy. It doesn't show as any  
8 kind of a copy to -- at least to Mr. Herring.  
9 It still remains to be hearsay with an issue  
10 of reliability. What do you -- what is your  
11 final position on that, Mr. Rose?

12 MR. ROSE: I --

13 MR. FELD: Again, these and others  
14 have been primarily offered to show the  
15 factual basis that we have of Mr. Herring's  
16 recollections. They were used by him in the  
17 preparation of the testimony to refresh his  
18 recollection for the written testimony.

19 We have included these and other  
20 similar ones in an effort to ensure that the  
21 record is complete, and is with the previous  
22 ones in which we have covered this offered

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1       these as the basis for his recollection rather  
2       than for the evidence. If they are not useful  
3       for that purpose, then there is no reason to  
4       include them.

5               JUDGE SIPPEL: Thank you. It is a  
6       question -- really, you don't put recollection  
7       exhibits in unless the witness can't  
8       recollect. Even if the witness has used them  
9       to prepare for the case, unless somebody asks  
10      him for the evidence -- the documents that he  
11      has used for preparation, and then you come  
12      into trial preparation materials, possible, if  
13      you have got an issue there. You know, that  
14      is the way it goes.

15             It is usually -- you know, you are  
16      sort of backing into the use of this, and it  
17      is causing more trouble than it is solving any  
18      questions. There are no questions to solve  
19      right now, actually.

20             So why -- 47 is identified, and it  
21      is rejected. It doesn't even -- well, in any  
22      event that is my ruling.

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1 (Whereupon, the above-referred to  
2 document was marked as WTV Exhibit  
3 No. 47 for identification, but was  
4 rejected as an exhibit.)

5 Now, you say there are other  
6 documents like this that are going to be  
7 objected to, but, I mean; can we -- can we  
8 find a batch of those and just kind of clip  
9 them and then move on to something else?

10 MR. ROSE: I am afraid it might be  
11 more efficient just to go serially, Your  
12 Honor.

13 JUDGE SIPPEL: All right. Okay.  
14 48.

15 MR. ROSE: 48 is the latest  
16 iteration of a record that WealthTV keeps  
17 regularly, and I believe has since it was  
18 launched. They keep records of what they know  
19 about their demographics.

20 The wider chart on the top of 48  
21 is that. The small chart on the bottom, as  
22 Mr. Herring will testify, is a little summary,

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1 sort of in the nature of notes he did to help  
2 him understand, you know, sort of summarize  
3 the chart. But this is something that wasn't  
4 created just for the litigation. This is  
5 something they do keep on a regular basis, and  
6 they update it from time to time, and this is  
7 -- this was printed off the latest update.

8 JUDGE SIPPEL: So you say it is a  
9 regular business record, and this was -- it  
10 was printed out for purposes of use in this  
11 case?

12 MR. ROSE: It is actually market  
13 demographics rather than viewership or  
14 something. It is information they keep about  
15 the markets they are trying to reach, and so  
16 forth.

17 JUDGE SIPPEL: Well, what --

18 PARTICIPANT: Can I just ask for  
19 clarification? Trying to or are reaching?

20 MR. ROSE: Well, there are  
21 different things here. I believe some of them  
22 are the market, the total market, what the

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1 different -- I am going to get into a  
2 terminology issue, but I think it is really  
3 self-explanatory what the headings are.

4 JUDGE SIPPEL: That is not self-  
5 explanatory.

6 (Laughter.)

7 I'm sorry.

8 MR. ROSE: Can you help me out  
9 with this? I am going to use the wrong  
10 terminology when I talk about --

11 MR. TOLLIN: If I can just have a  
12 moment here.

13 JUDGE SIPPEL: Let's go off the  
14 record a minute.

15 (Whereupon, at 3:01 p.m., the  
16 proceedings in the foregoing  
17 matter went off the record  
18 briefly.)

19 JUDGE SIPPEL: Let's go back on  
20 the record.

21 MR. COHEN: Okay. Let's hear with  
22 Mr. Feld has to say. Maybe I can clarify.

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1 MS. WALLMAN: Could we understand  
2 what Mr. Tollin's question was?

3 MR. TOLLIN: The statement was  
4 made that this is about the would-be subs, and  
5 I just wanted to know if it was about --

6 MR. FELD: Yes, this is a market  
7 analysis of the top DMAs who -- which MVPDs  
8 control, and I believe particularly which the  
9 percentage of subscribers in each of the  
10 designated DMAs as who -- which cable  
11 operators control, have what subscriber counts  
12 within those DMAs, as gathered from standard  
13 industry sources and references, as I  
14 understand it from Mr. Herring, what is now  
15 the running set of targets of whom they wish  
16 to market to and in what markets they wish to  
17 be present.

18 And I believe that this is -- if I  
19 may just confer for one moment -- and it is --  
20 well, it is submitted to show how WealthTV was  
21 unfairly restrained in their ability to enter  
22 the markets they wanted to enter as based on

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1 the -- which markets were dominated by  
2 defendants, and the extent to which the  
3 defendants' refusing to carry prevented them  
4 from entering those markets.

5 MR. TOLLIN: It shows that last  
6 one?

7 MR. FELD: Well, no.

8 JUDGE SIPPEL: That is the purpose  
9 for --

10 MR. FELD: The purpose for its  
11 introduction here is to take the document  
12 which was a document which they kept up, who  
13 is in what market, based on the markets that  
14 they wanted to enter, especially the top  
15 markets. And it will be used to argue how the  
16 inability to -- by Mr. Herring to argue how  
17 his inability being carriage on the defendants  
18 -- injured him in their business plan to enter  
19 these markets.

20 JUDGE SIPPEL: This is a -- so,  
21 yes, if you -- if you prove discrimination,  
22 then this is to show what you were denied by

1 that discrimination.

2 MR. FELD: Yes.

3 MR. COHEN: We have no objection,  
4 Your Honor.

5 JUDGE SIPPEL: No objection?

6 MR. COHEN: No.

7 JUDGE SIPPEL: All right. That is  
8 -- let me make sure I have the right number  
9 here now. This is 48. It is very well  
10 identified, certainly. And it is received  
11 without objection.

12 (Whereupon, the above-referred to  
13 document was marked as WTV Exhibit  
14 No. 48 for identification, and was  
15 received in evidence.)

16 I forgot to give the warning.  
17 There is a BlackBerry problem currently. We  
18 are getting some interference here.

19 My BlackBerry -- I don't have it  
20 with me, so it is not me.

21 MR. FELD: 49 is another --

22 JUDGE SIPPEL: Just a second.

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1 Let's see if the Reporter is okay on this.  
2 Seems to be. Okay. Let's go forward.

3 MR. FELD: 49 is another of the  
4 sort of e-mails that we discussed previously  
5 that was included in our effort to ensure that  
6 there was a complete record, and that if we  
7 were asked what the foundation for our -- if  
8 the witness was asked what the foundation for  
9 his opinion was, that that was in the record.  
10 We are happy to abide by the previous rulings  
11 with regard to this if it --

12 JUDGE SIPPEL: So this is --

13 MR. FELD: This is similar to 45  
14 and 47.

15 JUDGE SIPPEL: So it is being  
16 withdrawn.

17 MR. FELD: Yes.

18 JUDGE SIPPEL: Thank you. I will  
19 just put withdrawn. 49 is withdrawn.

20 (Whereupon, the above-referred to  
21 document was marked as WTV Exhibit  
22 No. 49 for identification, but was

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1 subsequently withdrawn.)

2 And do you have any more after  
3 this that -- I mean, like 50, 51, or something  
4 like that, or is -- are you going to go  
5 separately now to 50?

6 MS. WALLMAN: If I may, we had  
7 some correspondence with Cox last evening  
8 about their call reports.

9 MR. MILLS: Yes, we did.

10 MS. WALLMAN: How do you want to  
11 handle that?

12 MR. MILLS: Well, are you  
13 admitting -- are you offering this for  
14 admission? I am -- the issue is is there are  
15 a number of -- you have heard already  
16 reference to call reports. These are reports  
17 of sales people within WealthTV about meetings  
18 that they had to try to gain carriage on  
19 various distributors.

20 And they may be regularly kept in  
21 the course of their business, but they contain  
22 hearsay. And for the most part, the people

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1 who are preparing these reports, the sales  
2 people, are not being called as witnesses and  
3 won't be here to testify.

4 Our objection as defendants is --  
5 to these call reports is basically a hearsay  
6 objection. I don't have an objection to the  
7 fact that a call report was made or to the  
8 extent that call reports were relied upon.  
9 But there is no indicia of reliability, and  
10 these call reports contain too much hearsay.

11 So if there is -- as long as they  
12 are not being offered for the truth of the  
13 matters asserted within them, the fact that  
14 call reports are kept is not objectionable.  
15 And that would apply to a large number of  
16 these, and we have even -- Cox has identified  
17 a couple of call reports that we marked to be  
18 used in cross examination.

19 But, you know, if these are  
20 admitted, then there may be other call reports  
21 that we need to admit as well. But if they  
22 are not going to be admitted for the truth of

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1 the matters asserted, then we will not have to  
2 add additional documents.

3 JUDGE SIPPEL: Okay. What is the  
4 purpose for offering it?

5 MR. ROSE: I am not sure whether  
6 -- what the purpose of this particular one is.  
7 In general, the call reports we think have  
8 added an issue of reliability, because they  
9 are records that are regularly kept. The  
10 sales people are required to make a certain  
11 number of calls.

12 They are required to report on  
13 what happened. They are not seeing the big  
14 picture so much. They are just reporting on  
15 what they did that day, writing it down, they  
16 made the call, this is what was discussed. It  
17 has added reliability, because it is done  
18 regularly. It has been, you know, from the  
19 time they had the sales force, and that is how  
20 they keep those records.

21 I think there are some instances  
22 where we want to get into what was discussed

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1 at the meetings based on what was reported in  
2 the call reports.

3 JUDGE SIPPEL: We are only on 50  
4 now. 50 is a call report. 50 is hearsay.

5 MR. MILLS: I can give you the  
6 call report, the numbers of those if you would  
7 like.

8 JUDGE SIPPEL: Well, wait a  
9 minute. Before I -- let me just do this one,  
10 and then we will see. It is offered -- I  
11 still don't understand. Is it being offered  
12 as -- Mr. Mills says -- is it being offered  
13 for the purpose of showing the truth of what  
14 is in it? Or is it being offered for the  
15 purpose of showing that it is a business  
16 practice to keep call reports?

17 MS. WALLMAN: It is being offered  
18 to show that there is a business practice of  
19 keeping call reports, and it is being offered  
20 to show that a visit occurred. And I may say  
21 although this certainly is no form of estoppel  
22 for defendants, these call reports, sales

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1 reports, were vigorously sought in discovery.  
2 And we produced them, and now they don't want  
3 them in the record.

4 JUDGE SIPPEL: Well, I know. They  
5 wanted them for -- probably for cross  
6 examination purposes, or to prepare their case  
7 in any number of respects. But not for  
8 purposes of endorsing them.

9 MS. WALLMAN: Certainly not, but  
10 -- certainly not, but that is the purpose for  
11 which they are offered.

12 JUDGE SIPPEL: For business --  
13 showing a business practice, and also showing  
14 that they -- the fact of that particular call?

15 MS. WALLMAN: Occurred.

16 JUDGE SIPPEL: That it occurred.

17 MS. WALLMAN: Yes.

18 MR. ROSE: Just to put it in  
19 context, the decision to carry isn't always --  
20 I mean, our position is that it was  
21 effectively made out at the home office, but  
22 the defendants are taking the position -- some

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1 of the defendants in any event -- that, you  
2 know, Wealth had and may still have the  
3 opportunity seek carriage at some of the local  
4 -- and I am going to use the wrong term again,  
5 but the local cable outfits. And part of the  
6 purpose of this is to show that we kept trying  
7 and kept getting turned down.

8 JUDGE SIPPEL: It can't be used  
9 for that purpose, though, unless you bring  
10 witnesses in. It can be used for the purposes  
11 that -- you know, that counsel has described.

12 MS. WALLMAN: Well, that is in  
13 fact what we are trying to get at, because  
14 part of the --

15 JUDGE SIPPEL: What is the "that"  
16 that you are trying to get at?

17 MS. WALLMAN: The trend that seems  
18 to be suggested in some of the trial briefs  
19 is, you know, at best WealthTV should be  
20 entitled to a hunting license, a term of art  
21 meant to mean there is a master agreement at  
22 the corporate level with permission to then go

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1 visit the local systems and try to sell them  
2 on the merits of WealthTV.

3 We have done that legwork, and  
4 there is no reason -- as we will argue in the  
5 remedy case, there is no reason to think that  
6 that would be more successful now than it was  
7 in the first place. So we are seeking to  
8 admit these call reports as evidence of a  
9 business practice, that we kept the reports,  
10 and that these visits occurred.

11 JUDGE SIPPEL: Well, we are back  
12 to where we were then.

13 MR. MILLS: Well, there is an  
14 objection to -- we don't know -- unless the  
15 witness is going to show up and say that they  
16 actually went on that trip, we don't know that  
17 the -- all we know is that the report was  
18 kept. And if they want to put it in that a  
19 report was kept and a visit was made, that is  
20 fine. But the fact of whether a visit  
21 occurred is going to have to be authenticated,  
22 is going to have to be testified to by a

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1 witness.

2 MR. FELD: Well, if I may, Your  
3 Honor, the point of the business records  
4 exception is because -- particularly this one  
5 is dated 2004, there are others -- that there  
6 are inherent indicia here that there is no  
7 reason to believe that an employee, in  
8 preparing a routine report which was kept in  
9 the ordinary course of business, is going to  
10 falsify that report, that the -- the idea is  
11 that there is sufficient indicia in these  
12 things that are routinely kept so as to allow  
13 when you have a company or a corporation that  
14 is testifying, to rely upon a sales force  
15 which has gone out and made these visits.

16 This is the basis of how Mr.  
17 Herring, in his role as President, keeps track  
18 of what is going on with his company. This is  
19 the only way in which it is possible, through  
20 these regular business records that are kept  
21 in a routine fashion, to have knowledge of  
22 what is going on.

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1           The likelihood of falsification  
2       for this -- or unreliability is traditionally  
3       regarded as lesser in these kind of routine  
4       summarizations that they place. And we would  
5       ask that, you know, they be allowed to be  
6       admitted for purposes both of confirming how  
7       Mr. Herring has the information we believe  
8       that he has on these issues, and, as we say,  
9       for the evidence in support of Mr. Herring's  
10      opinion and that we will set forward, that a  
11      hunting license, if we reach that stage of the  
12      remedy, would not be a useful remedy.

13           MR. COHEN: Well, Your Honor, they  
14      are going to have to --

15           JUDGE SIPPEL: Well, I am going to  
16      refuse that purpose right now.

17           MR. COHEN: Your Honor, they are  
18      still going to have to -- and I think this is  
19      part of Mr. Mills' point -- establish the  
20      reliability of these documents. They are not  
21      kept in the ordinary course anymore. All of  
22      the call reports that are being offered were

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1 generated in 2004.

2           There aren't a series of  
3 equivalent documents. There are some random  
4 e-mails, but call reports in the form of  
5 Exhibit 50, of which 99, 100, 101 are the  
6 same, do not exist, or at least they were not  
7 produced after the period 2004. So one of the  
8 issues that we have with respect to  
9 reliability is that these are documents by --  
10 that were generated by employees who have  
11 left, who I believe were fired, who have not  
12 -- are not here to testify.

13           So they are going to have to  
14 establish -- if they want to establish that  
15 this demonstrates anything other than a report  
16 was made, something that shows the  
17 reliability. They are not ordinary course  
18 documents for Wealth for the period 2004  
19 through 2008.

20           MR. MILLS: Your Honor, just to  
21 add to that, if they are going to be admitted  
22 now solely for the purpose of establishing

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1 that these records were kept, when they were  
2 kept, and the Court is going to reserve on the  
3 purpose for which they will be offered, that  
4 is fine.

5 I don't think that they should --  
6 they can be offered for the substance of what  
7 is in them. If they can be offered for the  
8 fact that visits were made, that remains to be  
9 seen. And that would make sense, because then  
10 we can wait and see if someone can sponsor the  
11 report and establish that there is a basis to  
12 admit it.

13 MS. WALLMAN: Your Honor, it would  
14 be in Mr. Cohen's -- it would be exceptionally  
15 formalistic to hold it against a small company  
16 that evolves over time and keeps records in  
17 different formats. And so I would ask you not  
18 to weigh that against the purpose for which  
19 this will be admitted.

20 JUDGE SIPPEL: Well, the smallness  
21 of the company or evolving is not the problem.  
22 But the -- I thought we had this nailed. Let

1 me go back to it again. It wasn't -- your  
2 proffer is that there was a business practice,  
3 at least back in 2004, that the company made,  
4 that they both made the calls and they  
5 prepared a report of some sort on these --  
6 what are they called? I have got my notes  
7 here. Let me -- a call report.

8 A call report -- is that correct?  
9 I mean, I am assuming that is correct.

10 MS. WALLMAN: Yes, Your Honor.

11 JUDGE SIPPEL: So far.

12 MS. WALLMAN: It is a report of a  
13 visit or call made on the people described  
14 here.

15 JUDGE SIPPEL: Now, I have got --  
16 my notes have quotes around "call reports."  
17 Is that a term of art, or is that just your  
18 way of describing it here?

19 MS. WALLMAN: It is a commonly  
20 used term.

21 JUDGE SIPPEL: In the industry.

22 MS. WALLMAN: At least in --

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1 within the sales sector generally I think.

2 JUDGE SIPPEL: Oh, okay.

3 MS. WALLMAN: If we make a call on  
4 a prospect or a client, you call it a call  
5 report or a --

6 JUDGE SIPPEL: So sales people  
7 write these up as a matter of course -- call  
8 reports. Okay. Your opposition is conceding  
9 that these could be called -- he had no  
10 problem with receiving these as call reports  
11 that were made on the dates so identified, and  
12 that that was a practice, at least in the 2004  
13 time period.

14 The next question is -- and they  
15 are also willing to accept them for the  
16 purposes of the fact that those calls were  
17 made. So you have two things. And you have  
18 identified --

19 MR. MILLS: No, we didn't -- we  
20 didn't concede that.

21 JUDGE SIPPEL: No? That they were  
22 not made?

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1 MR. MILLS: Well, we don't know.  
2 That is not conceded. If they want to admit  
3 them for the purpose of showing that these  
4 records were made, that is one thing.

5 JUDGE SIPPEL: Yes.

6 MR. MILLS: But I don't have any  
7 -- you know, we don't know that there is  
8 anyone that can authenticate that these calls  
9 were actually -- that the visits were actually  
10 conducted or that the substance of the visits  
11 were actually accurate.

12 JUDGE SIPPEL: Well, that is a  
13 different issue. The accuracy is different.

14 Mr. Beckner, have you got --

15 MR. BECKNER: Yes, if I might,  
16 since this exhibit -- proffered Exhibit 50 is  
17 about my client.

18 (Laughter.)

19 JUDGE SIPPEL: Well, it is about  
20 time.

21 (Laughter.)

22 MR. BECKNER: Get a word in or

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1 two. First, about this document, I don't even  
2 know who wrote it. It doesn't say who wrote  
3 it. There is a date at the top. It says July  
4 27, 2004. I don't know if that is the date of  
5 the meeting or the date the document was  
6 created.

7 There is an exception to the  
8 hearsay rule for so-called present  
9 recollection or recorded, but that requires  
10 that the recordation be made very close in  
11 time to the event. I don't know if that is  
12 true or not.

13 I, frankly, would disagree with  
14 the idea that a "call report" is inherently  
15 reliable. In fact, I would say -- and, of  
16 course, we have no witnesses here to ask about  
17 this -- is that it is inherently unreliable,  
18 that in fact sales people have a great  
19 incentive to -- this report says this was a  
20 good meeting.

21 After overcoming her concern about  
22 us being too elitist, Colleen said, "I like



1 it. I get it. It seems new and different."  
2 We don't know what else Colleen said at the  
3 meeting. She may have said after these  
4 statements, "But, you know, it is just not  
5 right for an audience in Bakersfield."

6 So this is just -- this is, you  
7 know, a difficult report, you know, just to be  
8 offered for the truth for what it appears to  
9 be, which is it purports to be an account of  
10 a meeting by someone.

11 MS. WALLMAN: But, Your Honor, I  
12 thought we had narrowed the issue to whether  
13 this might be admitted to show that there was  
14 a business practice of making call reports,  
15 and that this meeting occurred.

16 JUDGE SIPPEL: Well, not that this  
17 meeting occurred, but that there was a call  
18 made. I mean, I am not trying to pare down  
19 what you said, but it is not for purposes of  
20 saying that the call was made and this is what  
21 it was about. It is just that there was a  
22 call made. And I am getting now an objection

**NEAL R. GROSS**

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